Office - Supreme Court, U. S.
FILED
DEC 1 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 728.

EDNA B. ELIAS,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

EDGAR B. BRONSON,
Counsel for Petitioner.

JEREMIAH T. MAHONEY,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Argument 1

I—The Court below decided that petitioner did not have the power to remove her husband and to appoint a trustee in his place..... 1

II—The respondent's other arguments are dealt with in the petitioner's main brief..... 4

Conclusion 4

TABLE OF CASES CITED:

Dupuy v. *U. S.*, 35 F. (2d) 990 (Court of Claims).... 3

Employers Liability Assurance Corp. v. *Morrow*, 143 Fed. 750 (C. C. A. 6)..... 3

Fleischman v. *Furgueson*, 233 N. Y. 235..... 3

Harrity v. *Continental Eq. T. & T. Co.*, 280 Pa..... 3, 4

Manson v. *Curtis*, 223 N. Y. 313..... 3

Morrill etc. Construction Co. v. *City of Boston*, 186 Mass. 217 4

Pittsburgh & Shawmut R. R. Co. v. *Central Trust Co.*, 156 N. Y. App. Div. 182..... 3

Town of Tonawanda v. *Stapell, Munn & Beals Corp.*, 147 N. Y. Misc. 768..... 3

Wilson & English Construction Co. v. *N. Y. C. R. R. Co.*, 240 N. Y. App. Div. 479..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 728.

EDNA B. ELIAS,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

Argument.

I.

The Court below decided that petitioner did not have the power to remove her husband and to appoint a trustee in his place.

The respondent asserts (his brief, bottom of p. 6), that the Court below did not consider it necessary to pass upon his contention that the petitioner-grantor had power under the trust instruments to change any trustee and to appoint a successor with the full powers of his predecessor.

But the petitioner submits that it is apparent that on the contrary the Court below did consider that

question and resolved it, in accordance with the rules of construction, against the respondent's contention.

The trust instruments provided (taking the Albert J. Elias trust for example): that the *party of the second part* (the husband) was to use the trust income in his sole discretion for the support of the beneficiary (R. 54; 115); that during the lifetime of Henry Hart Elias (the husband) he should be the sole trustee with the special powers therein described (R. 54; 117); that Henry Hart Elias was given the power to use principal in addition to income, if advisable in his judgment, for the support of the infant beneficiary (R. 55; 119); that as long as Henry Hart Elias should be living and competent to administer the trust, the application of the income and of any principal for the support of the beneficiary was to be made by Henry Hart Elias in his sole discretion, but that in the event of the substitution of another trustee, then the entire net income was to be paid over to the guardian of the beneficiary (R. 55; 119); that if Henry Hart Elias should die before the termination of the trust, then a trust company and an individual were appointed substituted trustees, but the absolute discretion as to investments given to Henry Hart Elias was not to apply to the substituted trustees, the powers of the substituted trustees were to be only such as are the usual and customary powers of trustees (with certain exceptions not material here) and also power in their discretion to retain any of the investments made by Henry Hart Elias (R. 55-7; 120-1).

Then near the end of the instrument, it was provided in general terms (R. 57; 122) that the grantor reserved the right to change any or all of the "Trus-

tees named in this instrument, their successor or successors" and to appoint the successor or successors of said trustees, the said successors to have all the powers conferred upon "The trustees herein appointed by her" (only one trustee had been appointed, Henry Hart Elias).

Clearly the *later general* provision concerning the grantor's right to change the trustees, was not intended to nullify the *prior special* provisions appointing the husband trustee for life and conferring on him the powers therein particularly described. The power to change the trustees related only to changing *substitute* trustees (see R. 97-8).

The fundamental rule in the interpretation of contracts, is to ascertain the intent of the parties as expressed, by considering the whole instrument, and that interpretation is favored which will make every part of the instrument effective. *Manson* v. *Curtis,* 223 N. Y. 313, *320; Fleischman* v. *Furgueson,* 233 N. Y. 235, *239.*

But when two clauses are so inconsistent and repugnant that they cannot stand together, then the rule is that the *first clause will stand* and the last one will be rejected. *Pittsburgh & Shawmut R. R. Co.* v. *Central Trust Co.,* 156 N. Y. App. Div. 182, *189*; *Dupuy* v. *U. S.,* 35 F. (2d) 990 (Court of Claims), *at p. 1002*; *Employers Liability Assurance Corp.* v. *Morrow,* 143 Fed. 750 (CCA—6), *at p. 755.*

Moreover as between conflicting clauses, the *specific or particular one will prevail* over the general one. *Wilson & English Construction Co.* v. *N. Y. C. R. R. Co.,* 240 N. Y. App. Div. 479, *483*; *Town of Tonawanda* v. *Stapell, Munn & Beals Corp.,* 147 N. Y. Misc. 768, *771*; *Harrity* v. *Continental Eq. T. & T. Co.,* 280 Pa.

237, *242*; *Morrill etc. Construction Co.* v. *City of Boston*, 186 Mass. 217, *221*.

Applying these rules the Court below seems to have construed the trust instruments to mean that the grantor's power to change the trustees related only to substituted trustees, not to the husband, because he was appointed to be the sole trustee during his lifetime and he alone was to have the special powers therein described.

For if this were not so, it is difficult to see how the Court could have concluded as it did "that she surrendered all control of these trust funds and all income arising from them for a period of six years, six months and 15 days" (R. 146).

II.

The respondent's other arguments are dealt with in the petitioner's main brief.

CONCLUSION.

The petition for the writ should be granted.

Respectfully submitted,

EDGAR B. BRONSON,
Counsel for Petitioner.

JEREMIAH T. MAHONEY,
Of Counsel.